

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

ACTIVEVIDEO NETWORKS, INC.

Plaintiff/Counterclaim-Defendant,

v.

VERIZON COMMUNICATIONS INC., VERIZON
SERVICES CORP., VERIZON VIRGINIA INC.
AND VERIZON SOUTH INC.,

Defendants/Counterclaim-Plaintiffs.

Civil Action No. 2:10-cv-248
RAJ/DEM

**DECLARATION OF MICHAEL J. WAGNER IN SUPPORT OF PLAINTIFF'S
MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, POST-JUDGMENT
INTEREST AND DAMAGES FOR DEFENDANTS' CONTINUING INFRINGEMENT**

I, Michael J. Wagner, declare as follows:

1. I provided oral testimony during the trial and submitted expert reports in this matter on behalf of Plaintiff, ActiveVideo Networks, Inc. ("ActiveVideo"). I described my qualifications in my oral testimony and expert reports, and will not repeat them in this declaration. I have personal knowledge of the facts set forth in this Declaration. If called as a witness, I could and would testify competently to such facts under oath.

2. I have been asked to calculate the prejudgment interest that would be applied to the jury's damages award in this matter. The jury in this case returned a verdict for ActiveVideo and awarded damages against Defendants in the amount of \$115,000,000. The Court entered Judgment reflecting this amount on August 2, 2011.

3. The data upon which I based my damages analysis and calculation at trial, and upon which the jury rendered its verdict, had not been brought current by Defendants as of the date of trial. Rather, the subscriber data provided by Defendants covered only a period through

March 2011. As such, I was only able to estimate damages through this time period in my reports and at trial. I have also been asked to evaluate the calculation of damages for infringing sales by Defendants for the period since March 2011 until the date of judgment, August 2, 2011. If provided with supplemental subscriber data from Defendants, I would calculate infringement damages in the same way I did at the trial of this matter. I would use the reasonable royalty rate of \$1.13 per FiOS TV subscriber per month, which is derived directly from the damages awarded by the jury. (*See* Exhibit 1, at 8 (Schedule 1.4), attached hereto.) I would also calculate prejudgment interest on these additional damages in the manner described below.

4. In the absence of Defendants' actual subscriber data for April 2011 through August 2, 2011, I have estimated the subscriber amounts for these months using Defendants' actual subscriber data for prior months. Based on Defendants' average billable accounts prior to April 2011, I have estimated damages from Defendants' infringing conduct during this post-discovery period to be \$17,734,212. (Exh. 1, at 7 (Schedule 1.3). Using those estimates and Defendants' actual subscriber data, I have calculated the total prejudgment interest due on the damages from January 2006 to August 2, 2011 to be \$6,687,550. (Exh. 1, at 2 (Schedule 1.1)). In addition, using those estimates and Defendants' actual subscriber data, I have calculated ActiveVideo's total pre-judgment damages to be \$139,421,762. (*Id.*)

5. The methodology I employed in making the prejudgment interest calculation is as follows: (1) I determined the weighted average prime interest rate that prevailed during each quarter of the period since first infringement in the first quarter of 2006 (Exh. 1, at 3-4 (Schedule 1.2)); (2) I allocated proportionally the damages awarded by the jury to the infringing sales (Exh. 1, at 5-7 (Schedule 1.3)); and (3) I assumed that the royalty payments were paid quarterly, and due thirty days after the last day in the quarter, and (4) by compounding quarterly and using the

weighted average prime interest rate for each quarter, I calculated the prejudgment interest due on the damages awarded by the jury for each quarter (Exh. 1, at 3 (Schedule 1.2)).

* * * *

I declare under penalty of perjury that the foregoing is true and correct. Signed this 5th day of August 2011 in Mountain View, California.



Michael J. Wagner

Dated: August 8, 2011

Respectfully submitted,

/s/ Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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